

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

15 This Report and Recommendation is made to the Honorable Howard D. McKibben, Senior  
16 United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to  
17 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

18 Before the court is a Motion for Attorney's Fees Pursuant to Social Security Act Section  
19 206(b)(1) and U.S.C. § 406(b)(1). (ECF Nos. 20, 20-1 to 20-5.) The Commissioner filed a non-  
20 opposition. (ECF No. 21.)

## I. BACKGROUND

22 Plaintiff, represented by counsel, filed his complaint for review of the Commissioner's decision  
23 finding him not disabled on January 20, 2015. (ECF No. 1-2.) A motion for remand was then filed on  
24 Plaintiff's behalf. (ECF No. 11.) The Commissioner filed a response and cross-motion to affirm.  
25 (ECF No. 13.) Plaintiff filed a reply and response to the cross-motion. (ECF No. 14.) On February 1,  
26 2016, the undersigned recommended that Plaintiff's motion be granted; the Commissioner's motion be  
27 denied; and that the matter be remanded for the calculation and award of benefits. (ECF No. 15.) The  
28 Commissioner filed an objection to the report and recommendation (ECF No. 16), and Plaintiff filed a  
response (ECF No. 17). On June 7, 2016, District Judge Howard D. McKibben entered an order adopting

1 and accepting the report and recommendation, and ordered the action remanded for the calculation and  
2 award of benefits. (ECF No. 18.) Judgment was entered the same day. (ECF No. 19.)

3 On January 24, 2017, the motion for attorney's fees was filed.

4 **II. DISCUSSION**

5 The court may award fees under 42 U.S.C. § 406(b)(1) when it "renders a judgment favorable  
6 to a claimant ... who was represented before the court by an attorney ... not in excess of 25 percent of  
7 the total of the past-due benefits to which the claimant is entitled by reason of such judgment[.]" "[A]n  
8 award under § 406(b) compensates an attorney for all the attorney's work before a federal court on behalf  
9 of the Social Security claimant in connection with the action that resulted in past-due benefits." *Parrish*  
10 *v. Comm'r of Soc. Sec. Admin.*, 698 F.3d 1215-20 (9th Cir. 2012). The claimant has the burden of  
11 producing "satisfactory evidence" in addition to his or her attorney's own affidavits, that the requested  
12 rates comport with "'those prevailing in the community for similar services by lawyers of reasonably  
13 comparable skill, experience, and reputation.'" *See Widrig v. Apfel*, 140 F.3d 1207, 1209-10 (9th Cir.  
14 1998) (quoting *Blum v. Stenson*, 465 U.S. 886, 895-96 n. 11 (1984)). Unlike a "fee-shifting" statute,  
15 which requires the losing party to pay the prevailing party's attorney's fees, § 406(b)(1) deals with the  
16 amount a prevailing party must pay his attorney. *See Widrig*, 140 F.3d at 1210-11. "The fee is payable  
17 'out of, and not in addition to, the amount of [the] past-due benefits.'" *Gisbrecht v. Barnhart*, 535 U.S.  
18 789, 796 (2002) (quoting 42 U.S.C. § 406(b)(1)(A)).

19 In conducting the fee analysis, the court should begin with the contingent fee agreement, and then  
20 test it for reasonableness. *Gisbrecht*, 535 U.S. at 808. *Gisbrecht* rejected the approach taken by many  
21 circuits, including the Ninth Circuit, that used the Lodestar method to determine the reasonableness of  
22 the fee. *See Crawford v. Astrue*, 586 F.3d 1142, 1148 (9th Cir. 2009).

23 Therefore, the court must first determine whether the contingency fee agreement is within the  
24 statutory twenty-five percent cap, and then must look at reasonableness of the fee. *Gisbrecht*, 535 U.S.  
25 at 800, 808; *Crawford*, 586 F.3d at 1149. In other words, "the district court must first look to the fee  
26 agreement and then adjust downward if the attorney provided substandard representation or delayed the  
27 case, or if the requested fee would result in a windfall." *Crawford*, 586 F.3d at 1151 (citing *Gisbrecht*,  
28 535 U.S. at 808).

1        In *Crawford*, the Ninth Circuit recognized that *Gisbrecht* did not provide a “definitive list of  
2 factors that should be considered in determining whether a fee is reasonable or how those factors should  
3 be weighed.” *Crawford*, 586 F.3d at 1151. As a result, *Crawford* set forth factors that district courts  
4 should consider in determining the reasonableness of the fee, including: (1) the character of the  
5 representation (whether there was substandard performance), (2) the results achieved, (3) any delay  
6 attributable to the attorney requesting the fee, (4) whether the benefits of the representation were out of  
7 proportion with the time spent on the case, and (5) the risk assumed by counsel in accepting the case.  
8 *See id.* at 1151-52. “[A]s an aid to the court’s assessment of the reasonableness of the fee yielded by  
9 the fee agreement,’ but ‘not as a basis for satellite litigation,’ the court may require counsel to provide  
10 a record of the hours worked and counsel’s regular hourly billing charge for noncontingent cases.” *Id.*  
11 at 1148 (quoting *Gisbrecht*, 535 U.S. at 808). The attorney bears the burden of establishing that the fee  
12 sought is reasonable. *Id.* (citing *Gisbrecht*, 535 U.S. at 807).

13        Here, the terms of the contingency agreement between Plaintiff and his counsel is within the  
14 statutory limits of § 406(b). It provides for the recovery of twenty-five percent of past-due benefits  
15 awarded. (ECF No. 20-3.) According to counsel, total past due benefits were awarded in the amount of  
16 \$42,287.60, and counsel seeks to recover twenty-five percent of that amount, which is \$10,571.90.

17        The court also finds the requested fees to be reasonable. There is no indication Plaintiff’s counsel  
18 was ineffective or dilatory, and counsel achieved a favorable result for Plaintiff. 31.50 hours were spent  
19 on this case, and for \$10,571.90 in fees, that works out to an effective hourly rate of \$335.61. The  
20 amount requested is not out of proportion with the work performed, and the fees are not so large in  
21 comparison to the amount of time counsel spent that a reduction in fees is justified. *See Crawford*, 586  
22 F.3d at 1145 (approving requests for fees with an effective hourly rate of \$659, \$813, and \$875); *see also*  
23 *Hearn v. Barnhart*, 262 F.Supp.2d 1033, 1037 (N.D. Cal. 2003) (citing cases approving awards with  
24 hourly rates ranging up to \$694.44 and noting that “[s]ince *Gisbrecht* … district courts generally have  
25 been deferential to the terms of contingency fee contracts in § 406(b) cases, accepting that the resulting  
26 *de facto* hourly rates may exceed those for non-contingency-fee arrangements” because “courts recognize  
27 that basing a reasonableness determination on a simple hourly rate basis is inappropriate when an  
28 attorney is working pursuant to a reasonable contingency contract for which there runs a substantial risk

1 of loss.”).

2 Finally, attorneys representing Social Security claimants assume a significant risk in accepting  
3 these cases “including the risk that no benefits would be awarded or that there would be a long court or  
4 administrative delay in resolving the cases.” *Crawford*, 586 F.3d at 1152.

5 Therefore, after applying the factors discussed above, the court finds that counsel has  
6 demonstrated a twenty-five percent fee is reasonable for this case, and the motion for \$10,571.90 in fees  
7 under 42 U.S.C. § 406(b) should be granted.

8 **III. RECOMMENDATION**

9 **IT IS HEREBY RECOMMENDED** that the District Judge enter an order **GRANTING**  
10 the motion for fees in the amount of \$10,571.90 under 42 U.S.C. § 406(b)(1).

11 The parties should be aware of the following:

12 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to this  
13 Report and Recommendation within fourteen days of receipt. These objections should be titled  
14 "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points  
15 and authorities for consideration by the district judge.

16 2. That this Report and Recommendation is not an appealable order and that any notice of appeal  
17 pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed until entry of  
18 judgment by the district court.

19 DATED: April 26, 2017.

20   
21

22 WILLIAM G. COBB  
23 UNITED STATES MAGISTRATE JUDGE  
24  
25  
26  
27  
28